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IN THE
Supreme Court of the United States

JAMES S. and REBECCA DEATON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF YELLOWSTONE DEVELOPMENT LLC IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus Curiae Yellowstone Development LLC is involved in construction and development in the mountainous west.[1] It encounters regulatory issues, and on occasion possible compliance issues, concerning application of the requirements of Clean Water Act, as interpreted and applied by the U.S. Army Corps of Engineers, with respect to the definition of "waters of the United States."

This case squarely presents, in an enforcement context, what constitute "waters of the United States" for water bodies similar to the type that Yellowstone Development encounters in its projects – waters that are not adjacent to navigable waters, but that may flow through channels, for at least part of the year, that ultimately have a hydrological connection to waters that are navigable-in-fact.

SUMMARY OF ARGUMENT

This case presents an important and recurring question of law as to what constitute "waters of the United States" within the meaning of the Clean Water Act. The issue is of great practical significance for land development throughout the country. This question has not been but should be decided by this Court, and this case presents an appropriate vehicle for its resolution.

The phrase "waters of the United States", 33 U.S.C. § 1362(7), is the critical jurisdictional term that defines the reach of the Clean Water Act. The Court has previously considered

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[1] The parties have consented to the filing of this Amicus brief. Pursuant to Supreme Court Rule 37.6 Amicus states that this brief was not authored or funded by any person or entity other than Amicus or its counsel.

the meaning of that term in the context of bodies of water that are at or near the two end points of the continuum of possible water flows. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (isolated ponds, some only seasonal) ("*SWANCC*"); *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (wetlands abutting a navigable waterway).

This case squarely presents the issue of how the term "waters of the United States" should be defined in the context of the vast number of wetlands that are adjacent to putative water channels that lie between these end points. The Court has recognized that defining the limits of land and water would not be simple:

> Our common experience tells us that [wetlands identification] is no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of "waters" is far from obvious.

Riverside Bayview, 474 U.S. at 132. This case presents that question for resolution.

The courts of appeals are in substantial conflict as to the principles that, under *SWANCC* and *Riverside Bayview*, should be applied in determining the necessary nexus to navigable waters inherent in the term "waters of the United States" and thus the extent to which development issues on lands adjacent to these flows are governed by Federal, as opposed to State,

law.[2] In light of the great practical significance of this issue, the Court should grant the Petition and resolve the ambiguity that now creates confusion for developers, State and Federal regulators, and communities throughout the country as to the source of law that governs uses of land that are adjacent to bodies of water that are physically removed from waters that are navigable-in-fact.

There are several reasons why this case constitutes a particularly appropriate vehicle through which to resolve this jurisdictional question. First, the expansive definition of "waters of the United States" that the U.S. Army Corps of Engineers utilized in this case was developed in the course of this enforcement proceeding and had never previously been adopted through notice and comment rulemaking. Thus, this case reflects one of the principal problems with the current state of the law in this area, that regulated entities have great difficulty in ascertaining what body of law governs their obligations and their rights.

Second, the Fourth Circuit adopted an extremely broad construction of the term "waters of the United States", which would extend Federal jurisdiction to "any branch of a tributary system that eventually flows into any navigable body of water." (Pet. App. 20a (emphasis added)). The court of appeals' standard would sweep within federal jurisdiction over "navigable" waters limitless non-navigable flows. There is no regulatory consensus as to where a tributary system begins or

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[2] *Compare United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003) (Federal "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", including a roadside ditch) (Pet. App. 20a), and *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (same), *with In re Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003) (rejecting Federal regulation over roadside ditches on the ground that, under the interpretation of Section 1362(7) in *SWANCC*, a body of water is subject to Federal regulation only if "'the body of water is actually navigable or adjacent to an open body of navigable water.'")

when a water flow becomes part of a tributary system, especially in the conditions experienced in the semi-arid western mountain States where Amicus operates. While the test fashioned by the Fourth Circuit might have superficial appeal to a layman, in practice that standard would be very difficult to apply.

Finally, the Fourth Circuit's construction of "waters of the United States" would cut deeply into the responsibilities traditionally exercised by the States over the regulation of water flows and the development of land resources that abut those water flows. States manage their land and water resources by regularly distinguishing among types of water flows to avoid imposing water regulation on land features. There is no "clear indication" in the Clean Water Act that Congress intended an administrative interpretation at the "outer limits of Congress's power" that would alter the Federal-State balance in this manner. *SWANCC*, 531 U.S. at 172-173. Rather, the Fourth Circuit ignored express provisions of the statute that sought to prevent wholesale displacement of the primary State responsibility over development of land and water resources. 33 U.S.C. §§ 1251(b), 1370(2).

ARGUMENT

I. THE COURTS OF APPEALS ARE IN CONFLICT OVER THE DEFINITION OF THE JURISDICTIONAL TERM "WATERS OF THE UNITED STATES", AND THE POLAR INTERPRETATION ADOPTED BY THE FOURTH CIRCUIT IS NOT SUPPORTED BY A "CLEAR INDICATION" OF CONGRESSIONAL INTENT.

A. *There Is a Conflict Among the Circuits Concerning the Application of Section 1362(7) to Inland Waters That Are Not Navigable in Fact.*

The courts of appeals are in conflict as to the principles that should be applied in determining whether water flows that are physically removed by some distance from navigable-in-fact waters constitute "waters of the United States," within the meaning of 33 U.S.C. § 1362(7). This conflict creates confusion and inconsistency as to the extent to which the rights and obligations of persons who wish to develop lands adjacent to these water flows are governed by Federal, as opposed to State, law.

In *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the Court held that the Corps of Engineers had jurisdiction under Section 404(a) of the Act, 33 U.S.C. § 1344(a), over nonnavigable wetlands that actually abutted on a navigable waterway. The Court found that there was a significant nexus between these wetlands and navigable waters, so that the wetlands constituted "waters of the United States" within the meaning of 33 U.S.C. § 1362(7). The Court explicitly reserved judgment on the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water." *Id.* at 131-132.

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), the Court held that the Corps of Engineers did not have jurisdiction under Section 404(a) over isolated ponds in an abandoned sand and gravel pit, some of which were only seasonal. The Court emphasized the importance of the term "navigable" in Section 1362(7) and that the use of the phrase "waters of the United States" did not constitute a basis for reading "navigable" out of the statute. *Id.* at 171-172. The Court also specified that its

decision in *Riverside Bayview* was based upon the "significant nexus" between the wetlands and "navigable waters" *Id.* at 167. The Court cautioned that when an administrative interpretation of a statute invokes the outer limits of Congress' power, it expected "a clear indication" that Congress intended that result, especially when "the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.* at 172-173. The Court found "nothing approaching a clear statement from Congress" that it intended Section 404(a) to reach the isolated ponds and concluded that the Clean Water Act had been written to avoid "the significant constitutional and federalism questions" that would be raised by the Corps of Engineers' interpretation. *Id.* at 174.

The courts of appeals disagree as to whether Section 1362(7) should be applied to encompass any non-navigable water flow that, in a strict hydrological sense, might ultimately flow into other bodies of water that are navigable, despite the nature of the flow or its proximity to a navigable body of water. In this case, the Fourth Circuit held that Federal "jurisdiction extends to any branch of a tributary system that eventually flows into a navigable body of water", including a roadside ditch, and thus to any wetlands that are adjacent to those water flows. Pet. App. 20a. Similarly, in *United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003), the Sixth Circuit overturned a district court holding, based on *SWANCC*, that wetlands must be "directly adjacent to navigable waters" to be subject to regulation under the Clean Water Act. Instead, it explicitly adopted the Fourth Circuit's interpretation in *Deaton*. *See also United States v. Rueth Development Co.*, 335 F. 3d 598, 604 (7th Cir.), *cert. denied,* 124 S. Ct. 835 (2003) (relying upon the Fourth Circuit's holding in *Deaton).*

By contrast, in *In re Needham*, 2003 U.S. App. LEXIS 25318 (5th Cir. Dec. 16, 2003), the Fifth Circuit rejected as "unsustainable under *SWANCC*", the Federal government's argument that the regulatory definition of "navigable waters" extends to all tributaries of navigable in fact waters, including ditches, "that have any hydrological connection with 'navigable waters.'" *Id.* at 9-10. The court ruled that "in this Circuit . . under SWANCC, 'a body of water is subject to [Federal] regulation . . . if 'the body of water is actually navigable or adjacent to an open body of navigable water.'" *Id.* at *10, *citing Rice v. Harken Exploration Co.*, 250 F.3d 264, 269 (5th Cir. 2000).

Needham and *Rice* arose under the Oil Pollution Act, 33 U.S.C. §§ 2701-2720, rather than under the Clean Water Act. The OPA imposes strict liability upon parties that discharge oil into "navigable waters", a term that is defined in 33 U.S.C. § 2701(21) to mean "the waters of the United States, including the territorial sea." The language of this definitional provision thus is identical, in pertinent part, to the definition in Section 1362(7) of the Clean Water Act, and the two provisions are co-extensive. *Needham*, 2003 U.S. App. LEXIS, at *6.

Accordingly, there is a sufficient conflict to justify granting the Petition, in view of the great practical importance of the question.

B. The Polar Interpretation Adopted by the Fourth Circuit Is Not Supported by a "Clear Indication" of Congressional Intent to Extend Federal Jurisdiction to the Furthest Reaches Permitted by the Constitution.

The Fourth Circuit's decision would extend Federal jurisdiction to "any branch of a tributary system that eventually flows into any navigable body of water." (Pet. App. 20a)

(emphasis added). Since in a hydrological sense all water flows downhill, this definition is virtually without limitation in its own terms. It would drive to the outermost limit of authority granted the Federal government under the Commerce Clause of the Constitution. The construction adopted below would substantially interfere with State authority in the regulation of water flows, and thus in the regulation of development activities adjacent to those water flows.

The decision below thus clearly invokes the principle identified in *SWANCC*, that a "clear indication" of Congressional intent is required for an administrative interpretation at "the outer limits of Congress' power", which would "alter the federal-state balance by permitting Federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 172-173. The Fourth Circuit pointed to nothing in the language or legislative history of the Clean Water Act that would suggest that Congress, through its definition of "navigable waters", intended to sweep within the Federal regulatory scheme virtually all non-navigable water flows in the country, whether confined within natural or man-made channels, and regardless of their flow rate, duration of flow, or distance from open water.

To the contrary, in adopting the Clean Water Act, Congress recognized the responsibilities traditionally exercised by the States over the regulation of water flows and land uses and intended to preserve State authority, to the extent that jurisdiction was not otherwise reserved to the Federal government in the statute. In particular, as the Court noted in *SWANCC*, in 33 U.S.C. § 1251(b), Congress chose to "recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water

resources . . . ." *See SWANCC*, 531 U.S. at 166-167. Further, in 33 U.S.C. § 1370, Congress explicitly provided:

> Except as expressly provided in this chapter [the Clean Water Act], nothing in this chapter shall . . .
>
> (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.

Taken together, Sections 1251(b) and 1370(2) demonstrate that, in adopting the Clean Water Act, Congress acted with sensitivity toward traditional State powers and did not intend a wholesale alteration in the balance of Federal and State responsibilities for land and water development issues. As in *SWANCC*, these statutory provisions, and the failure of the Corps of Engineers to provide a "clear indication" of an explicit Congressional intent to authorize the agency to push to the limit of Federal constitutional power, create substantial grounds for doubting the validity of the maximalist interpretation of Section 1362(7) adopted by the court of appeals.

Since the Fourth Circuit's interpretation has subsequently been adopted by at least one other Circuit, the Court should grant the Petition in this case at this time, to resolve this important question concerning the respective jurisdictions of the State and Federal governments.

C. The Fourth Circuit's Interpretation Raises Significant Issues of Due Process.

The Petition also should be granted to assure that due process concerns are addressed. The definition of "waters of the United States" that the Corps of Engineers advocated in this case was developed and applied in the course of an

enforcement proceeding. That expansive definition had not previously been adopted by the agency through notice and comment rulemaking. The landowners therefore did not have formal notice of the great breadth with which the agency would seek to interpret the term. Indeed, to the extent that the Corps of Engineers previously had addressed the issue in preambles to its rules, the agency had adopted a much narrower interpretation of the term as applied to ditches that are far removed from open waters or waters that are navigable-in-fact. *See* Pet. at 4 n.3.

Since the Clean Water Act may be enforced criminally as well as civilly, the agency's failure to provide notice of the extreme reach it claims for the statute presents significant due process concerns. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204 (1988) (rejecting agency litigation position unsupported by regulations, rulings, or administrative practice); *United States v. Apex Oil Co.*, 132 F.3d 1287 (9th Cir. 1997) (rule of lenity applied where definitional section of regulation was ambiguous).

The due process concerns reinforce the conclusion that it is unlikely that Congress intended the term "navigable waters" to carry the far reaching meaning adopted by the Fourth Circuit. If there was any support in the Clean Water Act for the lower court's extension of Federal authority, due process concerns would require, at a minimum, that regulated parties be provided clear, adequate notice of the position. The lower court's decision fails to give proper weight to these Constitutional concerns.

II. SOURCE, DURATION AND FLOW OF WATERS ARE AMONG THE FACTORS THAT ARE PERTINENT TO DEFINING "WATERS OF THE UNITED STATES" AND IGNORED IN THE FOURTH CIRCUIT'S STANDARD.

In allowing Federal authority over any water that "might ultimately flow" to navigable water, the Fourth Circuit failed to consider the varied physical circumstances of non-navigable water flow. In contrast, the States, which have the most immediate knowledge of the geographic, hydrologic, climatic and geomorphologic conditions within their jurisdictions, routinely consider the nature and duration of water flows in deciding whether and how to regulate water flows and land uses. The lower court's standard would create conflicts with State laws by extending Federal authority of low, infrequent non-navigable flows.

The simple hydrologic nexus test adopted by the Fourth Circuit also ignores the need to define when a tributary system begins or when a water flow becomes part of a tributary system, especially in the conditions that apply in the semi-arid western States in which Amicus does business. There is no Federal definition of "tributary." It is often not possible for a person to know when a water flow enters a tributary and thus when, under the Fourth Circuit standard, Federal regulation of the "water body" would begin and state management of the land resources end.

There are multiple examples of extant definitions addressing geographic features that could be part of a tributary system or could constitute the point at which a water body commences. Review of even a few definitions shows that the Fourth Circuit's standard ignores significant technical and

policy concerns that are critical to deciding the limits of Federal jurisdiction under the Clean Water Act.

A. State Definitions Consider Duration and Nature of Flows for Regulatory Purposes.

The Clean Water Act's "federal-state balance", *SWANCC*, 531 U.S. at 172-173, reflects, in part, the recognition that the States have the most immediate knowledge of geographic, hydrologic and geomorphological conditions within their jurisdictions. The statute specifically protects the States' authority to establish management choices for their "land and water resources," 33 U.S.C. §§ 1251(b), 1370(2). States routinely consider features of duration and water source in defining their waters and in establishing regulatory standards. An over-simplified hydrologic standard – can water flow? – is not a sufficient way to distinguish between a land feature and a water feature. The lower court's decision warrants review to avoid unnecessary conflicts between State enactments and a Federal jurisdictional standard "at the outer limits" of Congressional authority.

Defining the point in the landscape where land ends and a water body begins involves technical and policy considerations. The States are keenly aware of the importance of identifying where a water system commences. Many States use definitions that distinguish among ephemeral, intermittent and perennial waters, addressing duration or source of the flow. Examples of such distinguishing definitions from mountain States include laws in Idaho[3], Arizona,[4] Montana[5], Utah[6], and Wyoming[7].

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[3] Idaho defines intermittent waters as "a stream, reach, or water body which has a period of zero (0) flow for at least one (1) week during most years. Where flow records are available, a stream with a...hydrologically-based flow of less than one-tenth (0.1) cfs is considered intermittent." IDAPA 58.01.02.003 (2003). The State defines an ephemeral water as "a stream,

By contrast, neither Congress nor the Federal agencies have promulgated a definition of "tributary" or "tributary system," or

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reach, or water body that flows only in direct response to precipitation in the immediate watershed and whose channel is at all times above the water table." IDAPA 58.01.01.260 (2003). Water quality standards apply to intermittent waters "during optimum flow periods sufficient to support the uses for which the water body is designated," and variances are allowed when "natural, intermittent, or low flow conditions or water levels prevent the attainment of the standard. IDAPA 58.01.02.070 (2003); IDAPA 58.01.02.260 (2003).

[4] Arizona defines an ephemeral water as "a surface water that has a channel that is at all times above the water table, and that flows only in direct response to precipitation." A.A.C. § R18-11-101(22) (2003). An intermittent surface water is a "stream or reach of a stream that flows continuously only at certain times of the year, as when it receives water from a spring or from another surface source, such as melting snow." *Id.* at (30).

[5] Montana defines an ephemeral stream as "a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table." MONT. ADMIN. R. 17.30.602(11) (2003). An intermittent stream is a "stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface run-off and groundwater discharge. *Id.* at (15).

[6] Utah defines ephemeral streams as those that flow "only in direct response to precipitation in the immediate watershed, or in response to the melting of a cover of snow and ice, and which has a channel bottoms that is always above the local water table." U.A.C. R645-100-200 (2002). Intermittent streams include those streams, or their reaches, that "drains a watershed of at least one square mile" or is "below the local water table for at least some part of the year and obtains its flow from both surface runoff and groundwater discharge." *Id.*

[7] Wyoming defines an "ephemeral stream" as "a stream which flows only in direct response to a single precipitation [sic] in the immediate watershed or in response to a single snow melt event, and which has a channel bottom that is always above the prevailing water table." WCWR 020-080-001(b)(xiii) (2003). An "intermittent stream" is "a stream or part of a stream where the channel bottom is above the local water table for part of the year, but is not a perennial stream." *Id.* at (b)(xxiv). A "perennial stream" is "a stream or part of a stream that flows continually during all of the calendar year as the result of groundwater discharge or surface runoff." *Id.* at (b)(xxxvii).

of the different types of water bodies that can occur within a tributary system, for purposes of determining Clean Water Act jurisdiction.[8] Rather, Federal regulations defining "waters of the United States" fail to clearly establish a sound relationship between some water flowing over land and "navigable waters."

The different classifications of streams used by the States lead to different regulatory consequences. For example, Idaho regulates work in and alterations to stream channels,[9] only in "natural water course[s] of perceptible extent with definite bed and banks which confine and conducts continuously flowing water."[10] Continuously flowing water is defined as "[a] sufficient flow of water that could provide for migration and movement of fish, and excludes those reaches of streams

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[8] There are no federal definitions of "ephemeral," "intermittent," and "perennial" waters other than those that were included within the Corps of Engineers' nationwide permits, as certain terms of the nationwide permits did not apply to ephemeral waters. *See* Issuance of Nationwide Permits; Notice, 67 Fed. Reg. 2,020, 2,094 (Jan. 15, 2002) (joint notice by EPA and Corps of Engineers). For these purposes, an ephemeral stream is defined as : "ha[ving] flowing water only during and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow." Intermittent streams have "flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow." These definitions do not apply to other Clean Water Act programs. The Corps of Engineers' regulation defining "waters of the United States" includes only "intermittent" streams. 33 C.F.R. § 328.3(a)(3). However, the United States has not disclaimed jurisdiction over "ephemeral" waters as well. *See, e.g.*, 67 Fed. Reg. at 2,075 ("...we are not suggesting that ephemeral streams are not jurisdictional waters under the Clean Water Act.")

[9] IDAPA 37.03.07.010 (2003).

[10] *Id.*

which, in their natural state, normally go dry at the location of the proposed alteration."[11]

In Utah, "ephemeral" and "intermittent" streams are treated differently with respect to coal mining and stream diversions.[12] Montana's coal mining statute offers distinctions between "ephemeral drainageways" and "intermittent streams" in a manner similar to Utah. Land within 100 feet of a perennial or intermittent stream or reach may not be disturbed by mining operations except as approved by State regulators.[13] In addition, Montana has expressly determined that certain low flow waters should not be subject to certain water quality regulations. This occurs under Montana's water quality statute which includes a policy of nondegradation of "high quality waters."[14] Excluded from the category of high quality waters are those "surface waters that . . . have zero flow or surface expression for more than 270 days during most years."[15]

The Western Governor's Association position on Clean Water Act programs emphasizes the need for giving States flexibility to manage land and water resources.

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[11] *Id.*

[12] Among the regulatory distinctions, land within 100 feet of a perennial or intermittent stream may not be disturbed by mining operations unless specifically approved by the state *See generally* U.A.C. R645-301-700 (2002) (stream diversions).

[13] MONT. ADMIN. R.17.24.602(1) (2003). Ephemeral drainageways flow "only in response to precipitation in the immediate watershed or in response to the melting snow or ice and is always above the local watertable." Intermittent streams are those that are "below the water table for at least some part of the year and that obtains its flow from both ground water discharge and surface runoff."

[14] Mont. Code Anno. § 75-5-303 (2003).

[15] Mont. Code Anno. § 75-5-103(10)(b) (2003).

> Much of our region is characterized by unique physical, chemical, hydrologic, and biological conditions and contains countless ephemeral streams, effluent-dependent streams, and man-made water conveyance systems. These streams flow only in response to sporadic precipitation, snowmelt, runoff, wastewater discharges, or the conveyance of water or reclaimed water intended for specific purposes. Western Governors urge your committee in reviewing the CWA, to take into account this environment.
>
> Watershed management should not be dictated by the federal government. Watersheds should be managed to meet people's needs while protecting our environmental resources. Federal methodology mandates are by definition "one size fits all" and are not appropriate for each and every state. Outcomes are more important to us than processes.[16]

Amicus does not suggest that any particular State approach is mandated by the Clean Water Act. States may have varied technical and policy reasons for adopting particular definitions of different water features and setting regulatory consequences that flow from the definitions. However, the Clean Water Act clearly preserved the authority of the States to regulate their land and water resources in this manner. Amicus submits that the Fourth Circuit's standard ignores the important physical and policy factors that the States have wrestled with and adopts a categorical test that would intrude on these State powers. That the States have routinely considered factors ignored by the

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[16] *Hearing on Governors' Perspectives on the Clean Water Act Before the House Comm. On Transportation and Infrastructure, Sub-Comm. On Water Resources & Environment*, 106th Cong. (Feb. 23, 199) (statement of Wyoming Governor Jim Geringer) *available at* http://www.westgov.org/wga/testim/cwa-wy.htm.

Fourth Circuit – such as duration and nature of flow – in defining their waters underscores the importance of the Petition and casts doubt upon the validity of the overly simplistic standard adopted below. Regulated parties like the Amicus suffer under the current legal atmosphere in which there is great disparity between Federal and State definitions of water and confusion over the soundness of the differing Federal and State approaches.

B. The Fourth Circuit's Broad Standard Would Extend Clean Water Act Jurisdiction to Land Features.

The Fourth Circuit's interpretation also ignores important lessons to be drawn from the varied technical vocabulary used to describe the point where land stops and water begins. The lower court apparently assumed, without supporting authority, that the start of a tributary system could be easily discerned, in deciding that a simple hydrological measure would provide a sufficient nexus to navigable waters to support Federal jurisdiction. However, between rainfall and snow melt traversing land and a traditionally navigable water, flow may occur in many different geographic features. Not only are these flows non-navigable, but there is no consensus on the point where such flow becomes part of a tributary system to a navigable water. Absent clear definitions, the Fourth Circuit's interpretation could extend Federal jurisdiction to many features commonly viewed as land.

A few examples illustrate this point. "Sheet flow" or "run off" are different terms frequently used to describe water before it becomes part of a stream or tributary system.[17] However, the

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[17] *See* GLOSSARY OF GEOLOGY 560, 587 (Julia Jackson ed., 1997) (Sheet flow is an "overland flow or downslope movement of water taking the form of a thin, continuous film over relatively smooth soil or rock surfaces and not concentrated into channels larger than rills."); Shuh-shiaw Lo, GLOSSARY OF

commonly-used, authoritative definitions do not readily identify the point of origin of a tributary system. There are many other common terms used to describe the small, frequently temporary, shallow features over which or through which water may flow before it becomes a "tributary." These include terms such as rills, gullies, erosion gullies, ephemeral gullies and ephemeral streams. It is far from clear where, among these various features, a tributary system begins and land ends.

For example, rills are defined as "[a] microchannel (usually a few inches deep) in which water concentrates as it runs downslope," "[a] rivulet," "[a] very small brook or stream," "[a] rill channel" which is also known as a "shoestring rill."[18] Gullies are channels "deeply eroded by water which usually flows only due to storm water runoff or during the melting of snow. A gully is smaller than a ravine, larger than a rill...."[19] Erosion gullies are created due to "erosion of soil or soft rock material by running water that forms distinct, narrow channels that are larger and deeper than rills and that usually carry water

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HYDROLOGY 1275, 1344 (Sheng Te Printers Ltd. 1992) (noting unchanneled nature of sheet flow and run off); GLOSSARY OF TERMS, Soil Science Society of America *available at* http://www.soils.org/sssagloss/search.html (noting unchanneled nature of sheet flow and run off); United States Geological Survey, USGS WATER SCIENCE GLOSSARY OF TERMS *available at* http://ga.water.usgs.gov/edu/dictionary.html: ("(1) That part of the precipitation, snow melt, or irrigation water that appears in uncontrolled surface streams, rivers, drains or sewers. Runoff may be classified according to speed of appearance after rainfall or melting snow as direct runoff or base runoff, and according to source as surface runoff, storm interflow, or groundwater runoff. (2) The total discharge described in (1), above, during a specified period of time. (3) Also defined as the depth to which a drainage area would be covered if all of the runoff for a given period of time were uniformly distributed over it.").

[18] *See* GLOSSARY OF HYDROLOGY 1249; *see also* GLOSSARY OF GEOLOGY 550.

[19] GLOSSARY OF HYDROLOGY 457; *see also* GLOSSARY OF GEOLOGY 211.

only during and immediately after heavy rains or following the melting of ice and snow."[20] Ephemeral gullies are "small channels eroded by concentrated flow that can be easily filled by normal tillage, only to reform again in the same located by additional runoff events."[21]

Persons like the Amicus, operating in semi-arid mountain terrain, live and work in locations with highly varied seasonal water flow on their property. During snow melt or storm events, water flows downhill over land and land features that arguably meet the definitions of rills, gullies, erosion gullies, ephemeral gullies or ephemeral streams. As a practical matter, those land feature over which the water may flow would be considered land, not water, under common understanding and for most purposes under State and local law. Yet under the jurisdictional standard adopted by the court below, because water could eventually flow from these features to navigable waters, all would be Federally regulated as a putative tributary system.

Before Federal jurisdiction over "navigable waters" is extended to these kinds of land features, there should be a clear indication of Congressional intent. At a minimum, the Federal agencies should be required to clarify through rulemaking – and notify landowners and the States – how far they think the Clean Water Act extends Federal jurisdiction over water flow over land, rather than arguing for sweeping extensions of Federal jurisdiction on a case by case basis in enforcement actions.

Under the lower court's approach, Federal jurisdiction arises wherever flow occurs, regardless of distance to navigable waters, duration of flow at the putative "starting point", source

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[20] GLOSSARY OF HYDROLOGY 635.

[21] *See* GLOSSARY OF TERMS, Soil Science Society of America *available at* http://www.soils.org/sssagloss/search.html.

of the water, or nature of the putative feature transmitting the water. Between the extremes previously addressed by this Court – adjacent to navigable waters and fully isolated from any other waters – water may flow in a manner and over a course that would not, under many State laws or common understanding, be part of a "tributary system." These important issues presented by the lower court's decision warrant review by this Court.

CONCLUSION

Amicus respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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